

NO. 45998-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LARRY TARRER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Stolz

No. 91-1-00712-0

Supplemental Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should the Court consider the alleged error where the defendant himself proposed the instruction?
2. Does this Court have authority to decide on the constitutionality or language of WPIC 4.01 where the Supreme Court has required trial courts to use WPIC 4.01?
3. Did *State v. Pirtle* find the language of WPIC 4.01 constitutional?

B. STATEMENT OF THE CASE.

1. Procedure

The substantive and procedural facts in this case have already been covered in the opening and response briefs in this case. This brief addresses the limited issues regarding the “reasonable doubt” instruction raised in the defendant’s Supplemental Brief.

C. ARGUMENT.

1. ERROR, IF ANY, WAS INVITED.

“[A] party may not request an instruction and later complain on appeal that the requested instruction was given.” *Seattle v. Patu*, 147 Wn.2d 717, 721, 58 P.3d 273 (2002), quoting *State v. Studd*, 137 Wn.2d 533,

546, 973 P.2d 1049 (1999)(additional internal citations omitted). Even where the challenge to a jury instruction raises a constitutional issue, the courts will not consider it if the defendant himself proposed the instruction. *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 143 (2005).

In the present case, the court's Instruction 2 was from WPIC 4.01, with the "abiding belief" language. CP 492. The defendant proposed a similar instruction, including the "a reason exists" language, but without "abiding belief"; citing WPIC 4.01. CP 443. The court essentially gave his requested instruction. CP 492. In addition, during the jury instruction conference, defense counsel made clear that the only part of WPIC 4.01, Instruction 2, that he objected to was the "abiding belief" language. 9 RP 1211-1212, 1220-1221, 1232-1233. The defendant cannot now complain that giving an instruction with language that he proposed was error.

2. THE COURT OF APPEALS IS BOUND BY *STATE v. BENNETT*.

The Court of Appeals is required to follow majority opinions of the Supreme Court. *State v. Gore*, 101 Wn.2d 481,487, 681 P.2d 227 (1984). This Court has no authority to decide on the constitutionality or language of WPIC 4.01 because the Supreme Court has required trial courts to use WPIC 4.01.

For a period of time, the *Castle*¹ instruction was approved for general use. *See*, 11 Washington Practice, Pattern Jury Instructions (2d edition, 1994), 4.01A (1998 pocket part). The instruction was different from WPIC 4.01. Some courts used other “non-standard” instructions, as well. *See State v. Cervantes*, 87 Wn. App. 440, 942 P.2d 382 (1997).

Eventually, in *State v. Bennett*, 161 Wn. 2d 303, 165 P.3d 1241 (2007), the Supreme Court found the *Castle* instruction constitutionally adequate, but disapproved of the instruction. *Id.*, at 315. The Court ordered that trial courts cease using the *Castle* instruction, in favor of the standard WPIC 4.01. *Id.*, at 318. Recently, in *State v. Jimenez-Macias*, 171 Wn. App. 323, 331-332, 296 P. 3d 1022 (2012), this Court found error in the further use of the *Castle* instruction, citing the requirement in *Bennett*.

The defendant raises an interesting issue that must be left to the Supreme Court to decide. As Justice Chambers observed; “Just because an instruction is approved by the Washington Pattern Jury Instruction Committee does not necessarily mean that it is approved by this court.” *Bennett*, 161 Wn. 2d at 307. However, it should be noted that the Washington Pattern Jury Instruction Committee operates under the auspices of the Washington Supreme Court, which endeavors to appoint

¹ *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656 (1997).

committee members representing many views, sections, and areas of practice. *See* 11 Washington Practice, Pattern Jury Instructions Criminal, Preliminary Materials (2014). Current WPIC committee members include criminal defense counsel Suzanne Elliott, Amanda Lee, and Rebecca Roe. *Id.* Genuine reform or clarification of jury instructions as basic and fundamental as WPIC 4.01 might most effectively be achieved by working through the WPIC Committee.

3. WPIC 4.01 IS CONSTITUTIONAL.

The explanation of the concept of “reasonable doubt” has challenged courts and attorneys for many years. In *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996), the defendant challenged the “reasonable doubt” instruction. While the focus was on the “abiding belief” language, the Court examined the entire instruction. The Court quoted the challenged instruction; highlighting the first sentence with approval: “A reasonable doubt is *one for which a reason exists and may arise from the evidence or lack of evidence.*” *Pirtle*, 127 Wn.2d at 657 (emphasis in the original). The Court went on to say that “WPIC 4.01 adequately defines reasonable doubt. Addition of the last sentence was unnecessary but was not an error.” *Id.*, at 658.

In *Pirtle*, the Supreme Court measured the reasonable doubt instruction against federal constitutional law. The Court compared the language of the instruction at issue to the requirements of *Victor v. Nebraska*, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). *Pirtle*, at 657-658. While the Court did not do a full constitutional analysis, it did consider the issue of constitutionality, stating; “Without the last sentence, the jury instruction here follows WPIC 4.01, which previously has passed constitutional muster.” *Id.*, at 658.

The issue for the reviewing court is not whether the language of WPIC 4.01 is open to debate or could be improved; the issue is whether the instruction violates the United States Constitution. The ultimate question is did the “[j]ury instructions, taken in their entirety,[] inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” *Pirtle*, 127 Wn. 2d at 656, citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072–73, 25 L. Ed. 2d 368 (1970). Here, the instructions, including Instruction 2, did so.

D. CONCLUSION.

The defendant cannot assign error to an instruction that he proposed. The constitutional and legal validity or viability of WPIC 4.01

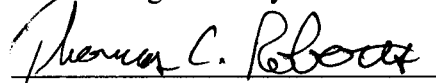
is an issue for the Supreme Court, who has mandated its use. The State respectfully requests that the conviction be affirmed.

DATED: March 30, 2015.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/30/15 
Date Signature

PIERCE COUNTY PROSECUTOR

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